

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN ROBERT SHELTON,

Appellant.

No. 61145-3-I

(consolidated with No. 61146-1-I)

DIVISION ONE

UNPUBLISHED OPINION

FILED: July 20, 2009

Leach, J. — Justin Robert Shelton challenges his conviction of possession with intent to deliver a controlled substance, arguing that insufficient evidence supports his conviction. He also requests remand of the judgment and sentence relating to his conviction of unlawful issuance of bank checks for entry of written findings of fact and conclusions of law. We reverse the conviction of possession with intent to deliver for insufficient evidence but affirm the conviction of unlawful issuance of bank checks because findings and conclusions have been entered.

Background

On November 18, 2006, Bellingham police officers pulled over a white Chevrolet Tahoe for improper illumination of the license plate. As soon as the

Tahoe came to a stop, the front passenger door opened and the male passenger ran from the scene. The driver of the vehicle, Lacey Devries, told police that the passenger was Justin Shelton and that he had run from the police because he did not want to talk to police. Devries told the police that Shelton ran because “there was some issue about a bad check.”

Devries was arrested for driving with a suspended license. During the search incident to arrest, officers found a woofer box and a box of stereo equipment in the rear cargo area of the Tahoe. She told officers Shelton had called her for a ride, and that when she picked him up, Brandon Ihde loaded the woofer and shoe box containing stereo equipment into the car. When she asked Ihde whether the items were stolen, he assured her they were not stolen. Officers also located a black Sentry brand lockbox in the rear cargo area, just behind the rear passenger seat. Devries said that she had never seen the box and had no idea how it got into her vehicle.

The box was locked, and officers found no keys. A trained narcotics detection dog alerted to the box, and officers obtained a telephonic search warrant to search the box. Inside the box, they found clear plastic baggies and pipes used to ingest controlled substances, baggies containing a white crystalline substance, a large number of empty baggies, and two scales of the type frequently used to weigh quantities of methamphetamine for sale. The white crystalline substances were tested at the state crime lab and confirmed to

be methamphetamine.

Shelton was charged on November 29, 2006, with possession with intent to deliver a controlled substance (methamphetamine) in violation of RCW 69.50.401(2)(b) and on December 15, 2006, with unlawful issuance of bank checks in violation of RCW 9A.56.060(1). He entered drug court but was terminated from drug court on November 8, 2007. The trial court held a stipulated bench trial and found Shelton guilty of both charges.

Discussion

Shelton argues there was insufficient evidence to prove that he possessed methamphetamine beyond a reasonable doubt. A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences therefrom.¹ The conviction must be reversed if, after viewing the evidence in a light most favorable to the State, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.²

Possession may be actual or constructive.³ To prove actual possession, the State must prove the item was in the actual physical custody of the person charged with possession.⁴ To prove constructive possession, the State must

¹ State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

² State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993).

³ State v. Staley, 123 Wn.2d 794, 798, 872 P.2d 502 (1994).

⁴ State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969).

prove the person charged with possession had dominion and control over the item, although he did not have personal custody.⁵ Passing control that is only a momentary handling is not possession.⁶ Mere proximity to contraband is likewise not sufficient to prove possession.⁷

Here, Shelton did not actually possess the methamphetamine, and there is no evidence that he constructively possessed it. Devries did not tell police that the box containing the methamphetamines belonged to Shelton; she said she had never seen it before and did not know how it got in her car. The trial court specifically found that “[t]he box was not found in the passenger area which had been searched previously and where Justin Shelton is alleged to have been seated at the time of the stop, nor is there any evidence indicating that he had dominion or control over the vehicle.” The court did not find that Shelton had dominion and control of the box that contained methamphetamine. The written findings do not support a conclusion that Shelton possessed methamphetamine.

The State argues that, while proximity itself is insufficient to prove possession, proximity along with other corroborating evidence can be sufficient to prove constructive possession. But there is no corroborating evidence here. The State points to the trial court’s oral finding that the box was placed in the

⁵ Callahan, 77 Wn.2d at 29.

⁶ Callahan, 77 Wn.2d at 29.

⁷ State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002).

vehicle at the same time Shelton got in the vehicle. However, a court's oral opinion is not a finding a fact, but merely an expression of its informal opinion at the time and may later be altered, modified, or completely abandoned.⁸ If necessary, a reviewing court may use the trial court's oral ruling to interpret written findings and conclusions.⁹ But if the trial court's written findings are not ambiguous, we do not look to the oral findings for interpretation.¹⁰

Furthermore, the oral finding is not supported by substantial evidence in the record and, if it were, it is insufficient to support the conviction. Devries told police that when she picked up Shelton, Ihde placed a woofer and a shoebox containing stereo equipment in the back of the Tahoe. She specifically said that she had not seen the black Sentry box before and did not know how it got there. Nothing Devries said connected Shelton to the Sentry box. There is insufficient evidence to infer that the box was placed there at the same time Shelton got in the vehicle. Even if the box had been placed there by Ihde at the same time Shelton got in the vehicle, there is no evidence that Shelton ever had dominion and control over the box.

Finally, the State argues that Shelton's flight is evidence of his consciousness of guilt, and thus corroborative evidence of his constructive possession of the box containing the contraband. "Evidence of flight is

⁸ State v. Hescok, 98 Wn. App. 600, 605-06, 989 P.2d 1251 (1999).

⁹ Hescok, 98 Wn. App. at 606.

¹⁰ See Hescok, 98 Wn. App. at 606.

admissible if it creates ‘a reasonable and substantive inference that defendant’s departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution.’”¹¹ Here, the inference that Shelton’s flight was due to his consciousness of guilt of the crime of possession of a controlled substance is neither reasonable nor substantive. Devries told police that Shelton ran because “there was some issue about a bad check.” Shelton’s flight is not evidence of his consciousness of guilt here because there is no other evidence connecting him to the controlled substance.

We hold that there is insufficient evidence to support the conviction for possession of a controlled substance with intent to deliver and therefore reverse that conviction.

Shelton requests remand of his conviction of unlawful issuance of bank checks because findings had not been entered at the time he filed this appeal. In criminal cases tried to the court without a jury, the court must enter written findings of fact and conclusions of law that address each element of the crime separately and state the factual basis for each element.¹² Written findings and conclusions regarding the conviction of unlawful issuance of bank checks were entered on November 18, 2008. The findings were based solely on the evidence

¹¹ State v. Freeburg, 105 Wn. App. 492, 497, 20 P.3d 984 (2001) (quoting State v. Nichols, 5 Wn. App. 657, 660, 491 P.2d 677 (1971)).

¹² State v. Silva, 127 Wn. App. 148, 151 n.2, 110 P.3d 830 (2005).

already taken, in compliance with our Supreme Court's holding in State v. Head.¹³ Therefore, Shelton's request for remand for entry of findings and conclusions is moot, and we affirm his conviction of unlawful issuance of bank checks.

Reversed in part and affirmed in part.

Leach, J.

WE CONCUR:

Cox, J.

Becker, J.

¹³ 136 Wn.2d 619, 625, 964 P.2d 1187 (1998).